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EQUITABLE SERVITUDES IN CHATTELS. — May agreements of a restrictive character be made to run with chattels in equity as well as with land? In *Werderman* v. *Société Générale d'Electricité*[1] the Court of Appeal thought that the burden of an agreement made upon sale of a patent would run with the patent as against subsequent purchasers with notice. The whole argument of Jessell, M. R., proceeds on the lines of *Tulk* v. *Moxhay*[2] and assumes the possibility of an equitable servitude in a patent.[3] But the Court of Appeal subsequently considered the Werderman case to be applicable only where the agreement imposes a charge or encumbrance.[4] And the general course of English decision since the Werderman case has served to cast doubt upon the possibility of creating equitable servitudes in chattels. It should be observed, however, that the Werderman case involved, not an agreement restricting the use of the patent, but an agreement binding the holder of it to pay money to the vendor. Such agreements would not create servitudes in the case of land[5] and *a fortiori* should not do so in the case

[1] 19 Ch. D. 246.

[2] 2 Phil. 774. Thus Jessel, M. R., says: "It is a part of the bargain that the patent shall be worked in a particular way and the profits be disposed of in a particular way and no one taking with notice of that bargain can avoid the liability." (19 Ch. D. 246, 252.) Again: "How . . . it can be argued in a Court of Equity that an assign can take the patent with notice of that arrangement and keep all the profits for himself, I am at a loss to understand." (*Id.*, 253.)

[3] "I think it is tolerably plain that the parties intended certain liabilities to attach to the patent itself." (*Id.*, 251.)

[4] Bagot Pneumatic Tyre Co. *v.* Clipper Pneumatic Tyre Co., [1902] 1 Ch. 146.

[5] Haywood *v.* Building Society, 8 Q. B. D. 403; Smith *v.* Colbourne, [1914] 2 Ch. 533; Miller *v.* Clary, 210 N. Y. 127; 103 N. E. 1114. The party wall cases and their analogues (*e. g.*, Whittenton *v.* Staples, 164 Mass. 319, and cases cited on page 327), where covenantee is given an easement to maintain something in part on covenantor's land and the latter covenants to pay his proportion of the cost if and when he uses it, may be explained, as has often been observed, on a theory of preventing unjust enrichment by imposing a charge upon the thing in case it is used, without resorting to

of chattels. The other English cases involved agreements as to the prices to be charged upon resale.[6] Although these might fairly be said to be restrictive agreements restricting the use of the thing sold, they infringe the policy of the law as to freedom of trade in chattels to such extent that equity might well refuse to give them effect as creating equitable servitudes. In *Barker* v. *Stickney* [7] the purchaser of a copyright covenanted to pay certain royalties. They were not imposed by way of a charge upon the copyright and the court distinguishing the Werderman case declined to allow an equitable servitude.

In the United States the courts began by enforcing restrictive agreements with respect to the use of chattels in case of patents and copyrights.[8] But one of the cases [9] involved, along with a restriction on use, a restriction as to price on resale, and the federal courts are now definitely committed to the doctrine, also established in England, that such agreements will not be enforced against third persons who take with notice.[10] In so deciding they have sometimes argued against allowing equitable servitudes in chattels at all.[11] But in *Henry* v. *Dick Co.*[12] a restriction on use was enforced against third persons who took a patented article with notice, and *Motion Picture Patents Co.* v. *Universal Film Mfg. Co.*,[13] which purports to overrule *Henry* v. *Dick Co.*, was a case in which the restriction on use went beyond what was reasonable in order to secure the advantage of the patent on the thing patented and hence was one in which equity, in the case of a restriction upon the use of land, would have refused to allow an equitable servitude.

While Sir George Jessel's doctrine of servitudes in chattels on the analogy of *Tulk* v. *Moxhay* has appeared to fare hard at the hands of the courts in subsequent cases none of the cases have been such as to present a fair occasion for applying it. If the instinct of common-law lawyers is against such servitudes, the instinct of the mercantile community no less clearly calls for them, and within the recognized limits of the doctrine of equitable servitudes in general the preconceptions of lawyers may yet be found yielding to the exigencies of trade.

DOCTRINE OF *ULTRA VIRES* AS APPLIED TO BUSINESS CORPORATIONS. — In the case of *Cotman* v. *Brougham* [1] the memorandum of association of the company in question contained an objects clause with

any theory of equitable servitude. In this respect these cases are analogous to those in which equity imposes a constructive trust to prevent unjust enrichment of one who has promised for a consideration in hand to do something with respect to a thing which is to come into existence in the future. 3 POM. EQ. JUR., § 1288.

[6] Dunlop Pneumatic Tyre Co. *v.* Selfridge, [1915] A. C. 847; McGruther *v.* Pitcher, [1904] 2 Ch. 306; Taddy *v.* Sterious, [1904] 1 Ch. 354.

[7] [1918] 2 K. B. 356.

[8] New York Bank Note Co. *v.* Hamilton Bank Note Co., 28 App. Div. 411, 50 N. Y. Supp. 1093; Murphy *v.* Christian Press Publishing Co., 38 App. Div. 426, 56 N. Y. Supp. 597.

[9] Murphy *v.* Christian Press Publishing Co., *supra.*

[10] Bauer *v.* O'Donnell, 229 U. S. 1; Bobbs-Merrill *v.* Straus, 210 U. S. 339; Scribners *v.* Straus, 210 U. S. 352.

[11] Dr. Miles Medical Co. *v.* Park, 220 U. S. 373; Park *v.* Hartman, 153 Fed. 24.

[12] 224 U. S. 1. [13] 243 U. S. 502.

[1] [1918] A. C. 514.